Supreme Court, U.S.
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Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

PHILLIP T. BREUER,

Petitioner,

v.

JIM'S CONCRETE OF BREVARD,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

DONALD E. PINAUD, JR.
Counsel of Record
KATTMAN & PINAUD
Professional Association
4069 Atlantic Boulevard
Jacksonville, Florida 32207
(904)398-1229
Attorney for Petitioner
Phillip T. Breuer

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QUESTIONS PRESENTED FOR REVIEW

Whether an action commenced in state court under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, *et seq.*, (the "FLSA"), can be removed by the defendant to a federal district court, even though the FLSA expressly provides that the case can be "maintained" in state court?

Whether the Eleventh Circuit's Interpretation of the word "maintained" as used in the jurisdictional provisions of the FLSA conflicts with this Court's pronounced definition of the word "maintain" to be used when construing federal statutes?

Whether the conflict, disparity and deadlock of opinion between the Eleventh and First Circuits and the Eighth Circuit, and between dozens of district courts around the country, regarding whether FLSA actions commenced in state court are removable to federal court, warrants that this Court, as suggested by the Eleventh Circuit in its opinion below, grant this petition to resolve the question once and for all in order to bring uniformity to the federal courts, and eliminate widespread disparity between litigants in our federal system.

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to this proceeding are as captioned and there are no other parties.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Phillip T. Breuer, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") in the case of *Phillip T. Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308, Eleventh Circuit case number 02-10252, as that judgment affirmed an order of the United States District Court for the Middle District of Florida denying Petitioner/Plaintiff's motion to remand the District Court case back to Florida State court from which it was removed by Respondent/Defendant.

OPINION BELOW

The Eleventh Circuit's opinion, which was filed on June 5, 2002, is reported at 292 F.3d 1308, and appears in Appendix A to this petition at pages 1a through 6a.

The Eleventh Circuit's decision affirmed an unreported order of the United States District Court for the Middle District of Florida denying Petitioner/Plaintiff's motion to remand the District Court case back to Florida State court from which it was removed by Respondent/Defendant.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

The Eleventh Circuit filed its opinion below on June 5,

2002. No motion for rehearing or rehearing *en banc* was sought and, accordingly, the Eleventh Circuit entered its judgment as mandate on July 5, 2002. This petition has been filed with the Court within 90 days of the date the opinion under review was filed, and as such is timely pursuant to Supreme Court Rule 13.1.

STATUTES INVOLVED IN THIS CASE

The relevant substantive statutes involved in this case are as follows:

29 U.S.C. § 201, *et seq.*, is the Fair Labor Standards Act of 1938, as amended (the "FLSA"). The FLSA provides, *inter alia*, that certain employers are required to pay certain employees overtime pay for hours they work in excess of 40 in any given workweek.

29 U.S.C. § 216(b) sets out what type of damages and other relief a plaintiff in an FLSA suit can recover. This same section also provides for the jurisdiction for FLSA suits. Most relevant for this case, this section provides that "[a]n action to recover the liability prescribed [in this section] . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." (emphasis added).

28 U.S.C. § 1441(a), commonly known as "the removal statute," provides for the removal of certain federal causes of action to federal court when those actions are filed in state court based upon concurrent jurisdiction. Specifically, this section provides that "[e]xcept as otherwise expressly provided by Act

of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

STATEMENT OF THE CASE

This case concerns the somewhat arcane but very jurisprudentially important issue of whether under 29 U.S.C. § 216(b), the federal Fair Labor Standards Act of 1938, as amended ("FLSA"), a FLSA action, once commenced in state court, can be removed by a defendant to a federal district court. The whole of the controversy centers around Congress' statement in the above-stated provision of the FLSA that suits under the FLSA "may be maintained" in any court of competent jurisdiction. Petitioner, and many other plaintiffs like him around the country, contend that by stating FLSA suits may be "maintained" in state court once there filed, Congress has provided that FLSA suits commenced in state court cannot be removed by a defendant to a federal district court. Respondent, like many other defendants around the country, conversely contends that Congress' statement that FLSA suits may be "maintained" in state court is not an "express" prohibition against removal required by removal statute, 28 U.S.C. § 1441(a), and that therefore, FLSA suits are subject to removal.

On June 21, 2001, Petitioner commenced an action against Respondent in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, for back wages, prejudgment interest, liquidated damages, and attorneys fees pursuant to the FLSA, 29 U.S.C. §§ 201-219, and specifically, 29 U.S.C. § 216(b). Petitioner is a former employee of Respondent who alleges that he was entitled to, but failed to receive, overtime compensation from Respondent for hours he worked in excess of 40 per week over a period of several years.

On or about July 2, 2001, Respondent filed a notice of removal in the United States District Court for The Middle District of Florida. On or about July 24, 2001, Petitioner timely filed a motion in the District Court to have the case remanded

back to state court. Petitioner, in his memorandum of law in support of the motion, argued that pursuant to the FLSA and numerous well-reasoned case law interpretations thereof, FLSA actions, once commenced in state court, could be prosecuted there to final judgment, and could not be removed to a federal district court by a defendant. Respondent filed a memorandum of law in opposition to the motion. On or about the same day Petitioner filed his motion for remand, Plaintiff/Petitioner filed a motion for certification pursuant to 28 U.S.C. § 1292(b) to be allowed to petition for an interlocutory appeal to the United States Court of Appeals for the Eleventh Circuit in the event that his motion for remand was ultimately denied.

On December 7, 2001, District Judge Ralph W. Nimmons, Jr., entered an order denying Petitioner's motion for remand. (App. 8a). In a separate order entered that same day, Judge Nimmons granted Petitioner's motion for certification, finding that the District Court's order denying Petitioner's motion for remand involved a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal of that order may materially advance the ultimate termination of the litigation. The District Court, in the order granting the motion for certification, directed the clerk of the District Court to administratively close the case pending a decision by the Eleventh Circuit of whether to accept the appeal, and if so, pending resolution of the appeal.

On January 15, 2002, the Eleventh Circuit granted Petitioner's request for an interlocutory appeal of the District Court's order denying Petitioner's motion to remand. A full appeal then ensued.

After briefing and oral argument, on June 5, 2002, the Eleventh Circuit issued an opinion affirming the District Court's order denying Petitioner's motion for remand. (App.

1a-6a). In that opinion, however, the Eleventh Circuit recognized that a circuit split existed and went on even further to state that the matter of the removability of FLSA actions commenced in state court was so very unsettled around the country in both the circuit and district courts that it was important "for either Congress or the United States Supreme Court to resolve this issue and bring uniformity to the federal courts in this regard." (App. 6a). The Eleventh Circuit went the further step to pronounce that "Litigants should not be treated with such disparity in our federal system." (App. 6a). Thus, while the Eleventh Circuit affirmed the District Court's order denying Petitioner's motion for remand, the Circuit Court recognized that the issue of whether FLSA cases commenced in state court are removable to a federal district court is so very unsettled, conflicting and disparate in treatment around the country that this Court should grant this petition in the interest of fairness and justice to ultimately decide the issue once and for all.

REASONS FOR GRANTING THE WRIT

I. GENERAL OVERVIEW

The express language of the FLSA provides that an action for a violation of the FLSA can be "maintained" in any state court of competent jurisdiction. 29 U.S.C. § 216(b). Thus, it is certain, and undisputed, that a suit under the FLSA can be brought in state court. The FLSA, however, is of course a federal act, and as such it is also undisputed that federal district courts also have original jurisdiction to hear FLSA cases. At issue in the instant case is whether it is proper for FLSA actions, once commenced in state court by the plaintiff, to be removed by a defendant to a federal district court. Pursuant to 28 U.S.C. § 1441(a) (the removal statute), "except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the [federal district] courts . . . have original jurisdiction may be removed . . . to [a federal district] court . . . ." The ultimate question this Court is asked to decide in the instant case is whether the language of the FLSA providing that an action pursuant to the FLSA can be "maintained" in state court is an "express" provision by Congress that FLSA actions can be "maintained" to conclusion in state court (as opposed to merely being brought there), thereby prohibiting those actions from being removed to federal court under the removal statute. Though the question may appear "simple" on the surface, in practical effect it has wrecked judicial havoc nationwide.

II. THE COURT OF APPEALS' INTERPRETATION OF THE JURISDICTIONAL PROVISIONS OF THE FAIR LABOR STANDARDS ACT, 29 U.S.C. § 216(b), DIRECTLY AND EXPLICITLY CONFLICTS WITH THE EIGHTH CIRCUIT'S INTERPRETATION AND WITH THE INTERPRETATION OF NUMEROUS DISTRICT COURTS AROUND THE COUNTRY, AND DOZENS OF DISTRICT COURT OPINIONS NATIONWIDE CONFLICT WITH EACH OTHER ON THE SAME ISSUE IN A PROVERBIAL JURISPRUDENTIAL TRAIN WRECK

The Eleventh Circuit's interpretation of the "may be maintained" language of the FLSA in this case squarely conflicts with the interpretation of that same language in the FLSA by the Eighth Circuit, and with the interpretation of numerous federal district courts around the country. At the same time, however, the Eleventh Circuit's decision is consistent with a decision by the First Circuit and with many other decisions by various federal district courts finding on the other side of the issue[1]. To make matters just a little more confusing, two additional U.S. circuit courts of appeals have commented in *dicta* on the removableness of FLSA actions,

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1 See the Eleventh Circuit's opinion below (footnotes 1 and 2), (App. 3a-4a), where the Circuit Court lists some but not all of the dozens of district court opinions around the country which contradict each other as to whether or not FLSA cases commenced in state court are removable to federal court.

without providing any meaningful guidance.[2]

Fifty years ago, the United States Court of Appeals for the Eighth Circuit determined that once an FLSA action was commenced in state court it could not be removed to federal court. *Johnson v. Butler Brothers*, 162 F.2d 87, 90 (8th Cir. 1947). *Johnson* was the first appellate court to address the issue. The *Johnson* court held that by providing in the FLSA that an FLSA action may be "maintained" in state court, Congress intended that not only could such an action be commenced in state court, but that it could be prosecuted there to final judgment. *Id.* at 89.

Contrary to the holding and reasoning of the Eighth Circuit and the many district courts around the country which have followed or mirror its holding or reasoning, the United States Court of Appeals for the First Circuit concluded some 15 years ago that FLSA actions are removable to federal court, despite the statutory language that such actions may be "maintained" in state courts. *Cosme Nieves v. Deshler*, 786 F.2d 445, 451 (1st Cir. 1986). The *Cosme Nieves* court found that, while there are sensible policy arguments against permitting removal of FLSA suits, language added to the removal statute (28 U.S.C. § 1441(a)) subsequent to the decision in *Johnson*, which language provides that federal civil

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2 The Ninth Circuit, without analysis and in a case which did not involve or implicate the FLSA, has summarily suggested that FLSA actions are removable. *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1196 (9th Cir. 1987). The Fifth Circuit has expressly rejected an opportunity to comment on the issue, but has noted that the removableness of FLSA actions is not well-settled. *Baldwin v. Sears Roebuck and Company*, 667 F.2d 458, 460 (5th Cir. 1982).

actions are removable "except as otherwise expressly provided by Act of Congress," creates a requirement that Congress give an explicit directive that cases based in federal law be non-removable, which the *Cosme Nieves* court concluded had not been done in the FLSA. *Id* at 451. The *Cosme Nieves* court concluded that Congress had not given the required explicit directive in the FLSA despite recognizing that, even after the above-quoted language was added to the removal statute, a 1958 Senate Committee Report noted that Congress itself recognized the inadvisability of permitting removal of cases arising under such laws as the FLSA. *Id.* That same Senate Report, however, which was unpersuasive to the First Circuit, has been cited to as an authority for Congressional intent by numerous district courts around the country which have held FLSA cases are not subject to removal. *See e.g., Moreland v. Gold Kist, Inc.*, 908 F. Supp. 898, 900 (N.D. Ala. 1995) ("Congress . . . has recognized the inadvisability of permitting removal of cases arising under . . . the Fair Labor Standards Act. . . .[and] has given the workman the option of filing his case in either State . . . or Federal Court."). S. Rep. No. 1830 (1958), *reprinted in*, 1958 U.S.C.C.A.N. 3099; quoted in, *Wilkins v. Renault Southwest, Inc.*, 227 F. Supp. 647 (N.D. 1964).

In this case, the Eleventh Circuit, in an opinion with little novel analysis, affirmed the district court's denial of Petitioner's motion for remand and pronounced that FLSA cases commenced in state court are subject to removal based upon the same rationale and analysis of the *Cosme Nieves* court. (App. 3a). Thus, the Eleventh Circuit effectively adopted the holding and reasoning of the First Circuit as its own, making the First Circuit's decision most relevant for this petition. *See id.* As to the Eighth's Circuit's decision in *Johnson*, the Eleventh Circuit rejected the holding and analysis of the *Johnson* court on the grounds that *Johnson* was decided before

the removal statute was amended in 1948. (App. 3a). It did so, however, despite that, as has been recognized by several contemporary district courts, the *Johnson* decision should still be good law today since the controlling question as to the removability of FLSA actions is Congress' intent when it enacted the FLSA, and a hyper-technical interpretation of the later-enacted removal statute cannot be used to nullify that intent. *E.g., Esquivel v. St. Andrew's Construction*, 999 F. Supp. 863-865 (N.D. Tex. 1998).

As a result of the Eleventh Circuit's decision in this matter great conflict and disparity pervades the federal court system as to whether FLSA cases commenced in state court are removable to federal court. In the Eighth Circuit such cases are clearly not removable. In the First Circuit, and now the Eleventh Circuit, FLSA cases are clearly removable. As for all the other circuits, whether a FLSA case is subject to removal still varies from court to court, case to case, and judge to judge.

At first blush, this Court might opine that the Eleventh Circuit's decision in this case would provide some guidance or uniformity for future cases around the country where the circuit courts have not decided the issue, thereby lessening the conflict. However, such has already show to be totally incorrect. Only a month after the Eleventh Circuit decided the instant case, a district court in the Fifth Circuit, in the first (and so far only) decision to cite to the case below, flatly rejected the conclusions and analysis of the Eleventh Circuit and ruled that FLSA cases commenced in state court are not subject to removal. *Castillo v. Texans Can!*, 2002 U.S. Dist. LEXIS 12673 (N.D. Tex. July 11, 2002). Thus, confusion and disparity post-*Breuer* are just as they were pre-*Breuer*. This Court should grant this petition to resolve the widespread and present conflict at the circuit and district court level as to whether FLSA suits, once commenced in state court, are removable to federal court.

III. THE COURT OF APPEALS' INTERPRETATION OF THE WORD "MAINTAINED" AS USED IN THE JURISDICTIONAL PROVISIONS OF THE FAIR LABOR STANDARDS ACT CONFLICTS WITH THIS COURT'S STATED DEFINITION OF THE WORD "MAINTAINED" TO BE USED WHEN CONSTRUING FEDERAL STATUTES

The ultimate conclusion of the Eleventh Circuit in this case was that Congress' statement in the FLSA that FLSA suits may be "maintained" in state courts was not an "express" prohibition against removal, as is required by 28 U.S.C. § 1441(a). (App. 2a-3a). In so concluding, however, the Eleventh Circuit totally ignored the definition of "maintained" as has been set forth by this Court.

This Court has twice pronounced that, in interpreting federal statutes, "to maintain a suit is to uphold, continue on foot and keep from collapse a suit already began." *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 377 (1933); *Smallwood v. Gallardo*, 275 U.S. 56, 61 (1927) (emphasis added). Based upon this Court's unambiguous definition of what it means to "maintain" a suit, removal to federal court of FLSA suits commenced in state court is patently improper. Other well-reasoned opinions of district courts around the country recognize and give due deference to this Court's definition of what it means to "maintain" a suit such as an FLSA suit in state court, and those district courts have remanded FLSA suits appropriately. *E.g., Esquivel v. St. Andrew's Construction*, 999 F. Supp. 863-865 (N.D. Tex. 1998). The Eleventh Circuit in this case, however, did not analyze or consider this Court's pronouncement on the meaning

of the word "maintain," which meaning is absolutely paramount in the context of whether FLSA suits removed to federal court should be remanded to state court.

Because the Eleventh Circuit's holding in this case as to what it means to "maintain" a suit conflicts with this Court's definition of "maintain," this Court should grant this petition to resolve this conflict which pervades the entire country.

IV. IN AN UNUSUAL AND COMPELLING STATEMENT, THE COURT OF APPEALS WENT SO FAR AS TO FIND THAT IT WAS IMPORTANT FOR THIS COURT TO RESOLVE THE QUESTIONS PRESENTED TO BRING UNIFORMITY TO THE FEDERAL COURTS AND ELIMINATE DISPARITY AMONG FEDERAL LITIGANTS

Finally, to further impress upon the Court just how important it is that this Court grant this petition, the Court should look to the very unusual and strong-worded language of the Eleventh Circuit's opinion in this case where the Circuit Court recognized the serious problem that persists around the country due to the wide-spread confusion and conflict at the circuit and district court level about the removability of FLSA cases, and where the Eleventh Circuit itself explained why this Court should grant this petition:

> Because of the long standing difference among the district courts and the apparent conflict between the Eighth Circuit in *Johnson v. Butler Bros.* and the First Circuit in *Cosme Nieves*, and now with this Circuit, it would appear to be important for either Congress or the United States Supreme Court to resolve this issue and bring uniformity to the federal courts in this regard. Litigants should not be treated with such disparity in our federal system.

Opinion below, (App. 6a) (emphasis added).

In this case, the Eleventh Circuit, though ruling contrary to Petitioner's position, recognized the patent truism that it is

unfair, unjust and almost totally arbitrary how litigants are treated throughout the country when it comes to the instant question. Depending upon what circuit, what district court, or even which district court judge a case is before, the result of a motion to remand an FLSA case back to state court in some parts of the country is no more predictable than by a flip of a coin. As noted by the Eleventh Circuit in footnotes 1 and 2 of its opinion, the circuit court conflicts aside, there are literally dozens of district court cases in conflict with each other on this issue. (App. 3a-4a).

The current extent of the problem is such that the disparity is not merely an inconsequential matter of differing opinion. The problem has reached the point that, as stated by the Eleventh Circuit, litigants are not being treated fairly. Congress is not likely to resolve this matter in the foreseeable future. The problem has persisted for half a century and Congress has not addressed it yet. Over thirty years ago the problem of the disparity and conflict at the district court level was so serious and the split of authority so hopeless that one district court appropriately remarked that the federal district courts are "apparently deadlocked over the interpretation of statutory language," and "nothing less than a decision by the Supreme Court [is required] to resolve the differing views throughout the nation." *Hill v. Moss-American, Inc.*, 309 F. Supp. 1175, 1177 (N.D. Miss. 1970). Thirty two years after *Hill*, the deadlock and conflict at the district court level is much worse; Congress has taken no action to clarify the issue; and the conflict and deadlock now is beginning to grip the circuit courts. Due to the disparity and unfairness to litigants, and the hopeless conflict in the federal courts nationwide, this Court should grant this petition to resolve this question once and for all and restore fairness to, and eliminate disparity from, our federal system as advocated by the Eleventh Circuit itself.

CONCLUSION

Petitioner respectfully requests that this Court grant this Petition for Writ of Certiorari to review the merits of the Eleventh Circuit's decision below.

Respectfully submitted,

DONALD E. PINAUD, JR.
Counsel of Record
KATTMAN & PINAUD
Professional Association
4069 Atlantic Boulevard
Jacksonville, Florida 32207
(904)398-1229
Attorney for Petitioner
Phillip T. Breuer

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-10252

D.C. Docket No. 01-00763-CV-J-21TJC

PHILLIP T. BREUER,

Plaintiff-Appellant,

versus

JIM'S CONCRETE OF BREVARD, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(June 5, 2002)

Before WILSON, RONEY and ALARCÓN*, Circuit Judges.

PER CURIAM:

Plaintiff-appellant Phillip Breuer sued defendant-appellee Jim's Concrete of Brevard, Inc. in Florida state court for unpaid wages, liquidated damages, prejudgment

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* Honorable Arthur L. Alarcón, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

interest, and attorney's fees under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201, *et. seq.* Jim's Concrete removed the case to federal court pursuant to 28 U.S.C. §§ 1441, 1446, and Breuer subsequently moved to remand it back to state court. The United States District Court for the Middle District of Florida (Nimmons, J.) denied the motion for remand. An interlocutory appeal was certified. We affirm.

The question before this Court is whether the district court properly denied remand to state court on the ground that Congress did not expressly provide that an FLSA action, once started in state court, was not removable to federal court.

The argument turns on the interpretation of the words in the FLSA juxtaposed against the words in the removal statute. The removal statute, 28 U.S.C. § 1441(a), provides that any civil action brought in a state court over which the district courts of the United States have original jurisdiction may be removed by the defendant to the federal district court except as **"otherwise expressly provided by Act of Congress."** The FLSA, 28 U.S.C. § 216(b), provides that an action to recover under the statute **"may be maintained"** against any employer in any federal or state court of competent jurisdiction.

Appellant Breuer argues that the words "may be maintained" is an express provision by Congress that once an action is started in state court, it must remain there and cannot be removed. Jim's Concrete argues that those words do not amount to such a Congressional express prohibition of removal as required by the removal statute.

In this matter of first impression for this Circuit, we follow the guidance of Judge Levin H. Campbell writing

for the First Circuit in *Cosme Nieves v. Deshler*, 786 F.2d 445 (1st Cir. 1986). The court there held that without an "explicit statutory directive by Congress," FLSA cases may be removed from state court to federal court, and that § 216(b) was not such an express statutory prohibition against removal. *Id.* at 451. We adopt the reasoning of that opinion and it is unnecessary to repeat it here.

We note, as did the First Circuit, that the Eighth Circuit held in 1947 that FLSA cases brought in state court are not subject to removal. *Johnson v. Butler Bros.*, 162 F.2d 87 (8th Cir. 1947). One year after that decision, however, in 1948, Congress amended the general removal statute by adding the "except as otherwise expressly provided by Act of Congress" language. The Eighth Circuit focused on the "may be maintained" language of the FLSA and inferred that by those words, Congress intended to grant the plaintiff not only the right to file his action in state court, but also the right to prosecute the action to final judgment in that chosen forum. Interpreting the intent of Congress from the inferential meaning of its statutes is a far different exercise, however, from looking at the plain meaning of a statute for an express provision, a task with which the Eighth Circuit was not faced in *Johnson v. Butler Bros.* Starting in 1946, two years before *Johnson v. Butler Bros.* and continuing to the present time, district courts across the country have been split on this issue, with the great majority of them permitting removal.[1, 2, 3]

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[1] For district court cases that have allowed removal, *see Ehle v. Williams & Boshea, L.L.C.*, Slip Copy, 2002 WL 373271 (E.D. La. 2002); *Hesni v. Williams & Boshea, L.L.C.*, Slip Copy, 2002 WL 373273 (E.D.

(Continued on following page)

La. 2002); *Shaw v. CF Data Corp.*, Slip Copy, 2001 WL 1326528 (N.D. Tex. 2001); *Roseman v. Best Buy Co., Inc.*, 140 F.Supp.2d 1332 (S.D. Ga. 2001); *Valdivieso v. Atlas Air, Inc.*, 128 F.Supp.2d 1371 (S.D. Fla. 2001); *Brown v. Sasser*, 128 F.Supp.2d 1345 (M.D. Ala. 2000); *Mincy v. Staff Leasing, L.P.*, 100 F.Supp.2d 1050 (D. Ariz. 2000); *Chapman v. 8th Judicial Juvenile Prob. Bd.*, 22 F.Supp.2d 583 (E.D. Tex. 1998); *H & R Block, Ltd. v. Housden*, 24 F.Supp.2d 703 (E.D. Tex. 1998); *Lisai v. Chevron Stations, Inc.*, 1997 WL 694705 (N.D. Tex. 1997); *Barrois v. Hilton Title*, 1996 WL 312063 (E.D. La. 1996); *Brown v. Luk, Inc.*, 1996 WL 280831 (N.D.N.Y. 1996); *Troutt v. Stavola Bros., Inc.*, 1994 WL 772148 (M.D.N.C. 1994); *Loutfy v. R.R. Donnelley & Sons Co.*, 1992 WL 97761 (N.D. Ill. 1992); *Waldermeyer v. ITT Consumer Fin. Corp.*, 767 F.Supp. 989 (E.D. Mo. 1991); *Nesbitt v. Bunn Basket, Inc.*, 780 F.Supp. 1151 (W.D. Mich. 1991); *Isaac v. Wm. H. Pflaumer & Sons, Inc.*, 1990 WL 102808 (E.D. Pa. 1990); *Fraternal Order of Police, Red Rose Lodge No. 16 by Gainer v. City of Lancaster*, 1989 WL 60440 (E.D. Pa. 1989); *Spieth v. R & B Appliance Parts*, 1989 WL 56486 (D. Ariz. 1989); *Jacobson v. Holiday Travel, Inc.*, 110 F.R.D. 424 (E.D. Wis. 1986); *Ramos v. H.E. Butt Grocery Co.*, 632 F.Supp. 342 (S.D. Tex. 1986); *Taylor v. Brown*, 461 F.Supp. 559 (E.D. Tenn. 1978); *Barrett v. McDonald's of Okla. City*, 419 F.Supp. 792 (W.D. Okla. 1976); *Anthony v. West Coast Drug Co.*, 331 F.Supp. 1279 (W.D. Wash. 1971); *Hill v. Moss-Am., Inc.*, 309 F.Supp. 1175 (N.D. Miss. 1970); *Goettel v. Glenn Berry Mfrs., Inc.*, 236 F.Supp. 884 (N.D. Okla. 1964); *Niswander v. Paul Hardeman, Inc.*, 223 F.Supp. 74 (E.D. Ark. 1963); *Buckles v. Morristown Kayo Co.*, 132 F.Supp. 555 (E.D. Tenn. 1955); *Rossi v. Singer Sewing Mach. Co.*, 127 F.Supp. 53 (D. Conn. 1953); *Swettman v. Remington Rand, Inc.*, 65 F. Supp. 940 (S.D. Ill. 1946).

[2] For District court cases that have denied removal, *see Lopez v. Wal-Mart Stores, Inc.*, 111 F.Supp.2d 865 (S.D. Tex. 2000); *Esquivel v. St. Andrews Const.*, 999 F.Supp.2d 863 (N.D. Tex. 1998); *Pauly v. Eagle Point Software Co., Inc.*, 958 F.Supp. 437 (N.D. Iowa 1997); *Courtwright v. Bd. of Regents of Cent. Mo. State Univ.*, 1991 WL 255594 (W.D. Mo. 1991); *Bintrim v. Bruce-Merilees Elec. Co.*, 520 F.Supp. 1026 (W.D. Pa. 1981); *Haun v. Retail Credit Co.*, 420 F.Supp. 859 (W.D. Pa. 1976); *Carter v. Hill & Hill Truck Line, Inc.*, 259 F.Supp. 429 (S.D. Tex. 1966); *Wilkins v. Renault Southwest, Inc.*, 227 F.Supp. 647 (N.D. Tex. 1964); *Zorilla v. Puerto Rican Cement Co.*, 227 F.Supp. 159 (D.P.R. 1964); *Rolon v. Flexicore Co.*, 216 F.Supp. 954 (D.P.R. 1963); *Dando v. Stonhard Co.*, 93 F.Supp. 270 (W.D. Mo. 1950); *Maloy v. Friedman*, 80 F.Supp. 290 (N.D. Ohio 1948).

In other statutes where Congress has expressly prohibited removal, it did so in direct, unequivocal language. *See, e.g.*, 28 U.S.C. § 1445; 15 U.S.C. § 77v(a); 15 U.S.C. § 1719; 15 U.S.C. § 3612.

28 U.S.C. § 1445 states that "(a) **A civil action in any State court** against a railroad or its receivers or trustees, arising under sections 51-60 of Title 45, **may not be removed** to any district court of the United States. (b) **A civil action in any State court** against a common carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 11707 of title 49, **may not be removed** to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive or [sic] interest and costs. (c) **A civil action in any State court** arising under the workmen's compensation laws of such State **may not be removed** to any district court of the United States." 28 U.S.C. § 1445 (emphasis added).

15 U.S.C. § 77(v)(a) states, in part, that "**[n]o case** arising under this subchapter and **brought in any State court** of competent jurisdiction **shall be removed to any court of the United States**."

Both 15 U.S.C. §§ 1719 and 15 U.S.C. § 3612 state, in part, that "**[n]o case** arising under this chapter and **brought in any State court** of competent jurisdiction

[3] We note that there is a split within the district courts of the Eighth Circuit, and one of those cases which held in favor of remand recognized that "the majority of district courts, and the only circuit courts which have addressed the removal issue, have concluded that *Johnson* is no longer a good authority in light of the 1948 amendment of § 1441(a)." *Pauly*, 958 F.Supp. at 439.

shall be removed to any court of the United States, except where the United States or any officer or employee of the United States in his official capacity is a party."

Because of the long-standing difference among the district courts and the apparent conflict between the Eighth Circuit in *Johnson v. Butler Bros.* and the First Circuit in *Cosme Nieves*, and now with this Circuit, it would appear to be important for either Congress or the United States Supreme Court to resolve this issue and bring uniformity to the federal courts in this regard. Litigants should not be treated with such disparity in our federal system.

AFFIRMED.

APPENDIX B

United States Court of Appeals
For the Eleventh Circuit

No. 02-10252

District Court Docket No.
01-00763-CV-J-21TJC

PHILLIP T. BREUER,

Plaintiff-Appellant,

versus

JIM'S CONCRETE OF BREVARD, INC.

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

JUDGMENT

(Filed June 5, 2002)

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: June 5, 2002
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

PHILLIP T. BREUER,

Plaintiff,

V. CASE NO. 3:01-cv-763-J-21TJC

JIM'S CONCRETE OF BREVARD, INC.,

Defendant.
_____/

ORDER

(Filed Dec. 7, 2001)

Filed herein is Plaintiff's Motion for Remand (Dkt. 5) and Defendant's Response (Dkt. 11) in opposition thereto. The Court has previously considered the issue presented – whether a case under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, filed in state court, can be removed to federal court – in *White v. Security and Surveillance, Inc.*, Case No. 3:97-cv-811-J-21B. In *White*, this Court issued an Order denying the plaintiff's motion for remand. In considering Plaintiff's Motion for Remand (Dkt. 5) in the instant case, the Court adopts the rationale from its Order issued in *White*. Accordingly, Plaintiff's Motion for Remand (Dkt. 5) is hereby **DENIED**.

DONE AND ORDERED, at Jacksonville, Florida, this 7th day of December, 2001.

/s/ Ralph W. Nimmons, Jr.
RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAVID WHITE and
PAMELA DANIEL,

Plaintiff,

V. CASE NO. 97-0811-CIV-J-21-B

SECURITY AND SURVEILLANCE, INC.

Defendant.

ORDER

(Filed Nov. 7, 1997)

This cause comes before the Court on Plaintiffs' Motion to Remand (Dkt. 5) and Defendant's Response (Dkt. 9) in opposition thereto.

General Background

This action to recover unpaid back wages, prejudgment interest thereon, liquidated damages, and attorney's fees and costs pursuant to the Fair Labor Standards Act (hereinafter sometimes referred to as "FLSA"), 29 U.S.C. §§ 201-219, was filed on June 3, 1997, in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, by Plaintiffs David White and Pamela Daniel against Defendant Security and Surveillance, Inc. On June 27, 1997, Defendant filed its Notice of Removal (Dkt. 1), removing this action to this Court pursuant to 28 U.S.C. § 1441, based on this Court's asserted original jurisdiction over Plaintiffs' cause under 28 U.S.C. § 1331. Plaintiffs have now moved to remand this action to the state court, asserting that removal of the action was improper.

Plaintiffs' Motion to Remand

In support of their Motion to Remand, Plaintiffs rely upon the language of 29 U.S.C. § 216(b), a provision of the FLSA which expressly provides that an action to recover thereunder "may be maintained . . . in any Federal or State court of competent jurisdiction. . . . "[1] Thus, Plaintiffs assert, uncontradicted, that this action was properly brought in the Florida Fourth Judicial Circuit Court. Further, pointing to the use of the word "maintained" in § 216(b), Plaintiffs note that various other federal courts, including one federal court of appeals, have interpreted this language to mean that once an FLSA suit is commenced in state court, it cannot be removed to federal court. Acknowledging that this issue has not been addressed by the Eleventh Circuit, Plaintiffs argue that the intent of Congress in enacting both the FLSA and the removal provisions of Title 28, in conjunction with various public policy concerns, support the conclusion that FLSA suits commenced in state court can not be removed to federal court.

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[1] Prior to 1974, and the amendments effected by Pub. L. 95-151, § 10(a), (b), 29 U.S.C. § 216(b) provided that an action to recover under the FLSA "may be maintained in any court of competent jurisdiction. . . . " However, even prior to its amendment, the language of § 216(b) was interpreted to allow the initiation of suits under the FLSA in both state and federal courts. *See, e.g., Crouse v. North American Aviation of Kansas*, 68 F. Supp. 934, 935 (W.D. Mo. 1946). Further, as the pre-1974 version of § 216(b) used the identical phrase "may be maintained," the 1974 amendment is, for purposes of the issues currently before the Court, immaterial.

In opposition to remand, Defendant relies upon 28 U.S.C. § 1441, pursuant to which it removed this action to this Court. Section 1441(a) provides, in pertinent part, as follows:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State Court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where the action is pending.

Defendant notes both that FLSA actions fall within the original jurisdiction of the federal district courts under 28 U.S.C. § 1331 and that there exists no express act of Congress prohibiting the removal of FLSA actions to federal district courts, whether generally as a part of Chapter 89 of Title 28, which sets forth the general scheme of removal, or specifically as a part of the FLSA. Thus, Defendant argues that this Court should, as have various other federal courts, including one federal court of appeals, deny Plaintiffs' Motion to Remand.

Plaintiffs primarily rely upon the case of *Johnson v. Butler Bros.*, 162 F.2d 87 (8th Cir. 1947). The plaintiff in *Johnson* commenced an FLSA action in Minnesota state court and the defendant therein removed the action to federal court; the plaintiff thereafter filed a motion to remand which the district court denied. *Id.* On appeal, the Eighth Circuit reversed the denial of the motion to remand, based on the language of § 216(b) providing that an FLSA action "may be maintained" in state court. *Id.* at 88-89. The court noted that the word "maintained" and the word "brought" both include commencement or institution

of an action, but that the former was broader in meaning than the later, as it also included prosecution through to final judgment. *Id.* at 89. Reasoning that allowing the removal of state-court initiated FLSA actions to federal court could prevent all such actions from being prosecuted through to final judgment in state court, and thereby render the term "maintained" but a "truism ... [or] surplusage," the Eighth Circuit concluded that such actions could not be removed, thereby avoiding an unpalatable interpretation of the statute. *Id.* The Court was buoyed in this result based on its conclusion that such an interpretation of § 216(b) would "do no violence to the removal statute" of Title 28 as it then existed. *Id.*

In response, Defendant points to the 1948 consolidation and revision of the removal statutes, the result of which is Chapter 89 of Title 28 substantially in the form in which it exists today. Arguably one of the central provisions of Chapter 89, § 1441(a) provides, as quoted above, that "[e]xcept as otherwise expressly provided by Act of Congress" any state court civil action over which the federal district court has original jurisdiction may be removed by the defendant to that federal court. Defendants assert that the *Johnson* court's interpretation of the word "maintained," which relies on inferences about Congressional intent based solely on word usage, is insufficient to qualify as an "express[ ] provi[sion] by Act of Congress," as required by § 1441(a).

In rebuttal, Plaintiff cites to a 1958 Senate Report on a bill which, inter alia, enacted 28 U.S.C. § 1445(c), a provision which expressly prohibits the removal to federal court of state court civil actions arising under state workmen's compensation laws. *See* S. Rep. No. 1830 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099. After noting that

workmen's compensation cases are entirely creatures of state law, that the federal courts were overburdened, and expressing the opinion that removal of workmen's compensation cases to federal court preempted the operation of favorable summary procedures and venue restrictions available to plaintiffs under state law, thereby possibly working a hardship on such plaintiffs, the Senate Report continued its argument in favor of the bill, stating:

> Congress itself has recognized the inadvisability of permitting removal of cases arising under its own laws which are similar to the workmen's compensation acts of the States. In the Jones Act, The Fair Labor Standards Act, and the Railway Employers' Liability Act, all of which are in the nature of workmen's compensation cases, the Congress has given the workman the option of filing his case in either the State court or the Federal court. If filed in the State Courts the law prohibits removal to the Federal Court. This proposed legislation accomplishes the same purpose and grants the same privilege to workmen who are entitled to compensation under the State workmen's compensation laws. . . . "

Id. at 3106. Noting that the Supreme Court has held that "the touchstone of the federal district court's removal jurisdiction . . . is the intent of the Congress,"[2] Plaintiffs argue that the statement in this Senate Report is a clear and unambiguous statement of Congress' intention that FLSA actions not be allowed to be removed to federal court; further, Plaintiffs argue, the statement constitutes

[2] *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 66 (1987).

Congressional approval of the Eighth Circuit's decision in *Johnson*, discussed *supra*.

Defendant responds by reference to the case of *Cosme Nieves v. Deshler*, 786 F.2d 445 (1st Cir. 1986), wherein the First Circuit, in concluding that FLSA actions could be removed to federal court, inter alia, considered the significance of this Senate Report. After their employer removed the action to federal court, the *Cosme Nieves* plaintiffs, who had originally sued their employer in the Commonwealth court of Puerto Rico, moved to remand the suit to that court. *Id.* at 446. The district court denied the motion and plaintiffs appealed. *Id.* As in *Johnson* and as do Plaintiffs herein, the *Cosme Nieves* plaintiffs relied principally on the phrase "may be maintained" in 29 U.S.C. § 216(b) of the FLSA. *Id.* at 450. The First Circuit recognized the existence of the *Johnson* decision, but also recognized the 1948 amendments to Title 28, Chapter 89. *Id.* at 451. Reasoning that the "words 'expressly provided' [in § 1441(a)] must be construed to mean exactly that," and concluding that the ambiguous language of § 216(b) was "at best . . . suggestive" and not "an explicit statutory directive by Congress that the customary right to remove is abrogated in the instance of FLSA suits," the First Circuit declined to prohibit the removal of such suits. *Id.* In a footnote, the court noted that plaintiffs therein relied in part on the above-mentioned 1958 Senate Report. The First Circuit found this report to be unpersuasive authority for the plaintiffs' position, as the "amendment under discussion [in the report] involved 28 U.S.C. § 1445, . . . and neither 28 U.S.C. § 1441 nor 29 U.S.C. § 261(b) is mentioned or affected by the amendment. At best the statement is . . . an 'oblique reference.'" *Id.* at 451 n.18.

In response, Plaintiffs argue that the *Cosme Nieves* opinion "gave no weight" to the opinion in the Senate Report and "too quickly ignore[d] both the intent of Congress and the purpose of the removal statute in reaching its conclusion." (Dkt. 6 at 9). Plaintiffs assert that regardless of the fact that the bill discussed in the Senate Report did not affect either § 1441(a) or § 216(b), the statement in the report is nonetheless a "clear and unambiguous" expression of Congressional intent – the very thing that the Supreme Court has directed is to be examined in interpreting the removal statutes of Title 28 – leaving no room for doubt that Congress thought the *Johnson* case was correctly decided. Further, Plaintiffs take issue with the First Circuit's (at least implicit) conclusion that the 1948 amendments to Title 28 overruled the *Johnson* decision, arguing that in so reasoning the court went against the stated Congressional intent to limit, not extend, removability through enactment of those amendments. Continuing, Plaintiffs assert that when enacting the 1948 amendments to Title 28, Congress had in mind various policy considerations against removal of FLSA actions – namely, that removal was often merely a tool to delay, increase the costs of litigation, and harass a plaintiff, such as by relocating a small controversy from a rural state court to a distant federal court. Lastly, in favor of allowing a FLSA plaintiff the absolute choice of the forum of adjudication, Plaintiffs emphasize the primacy that the law places on wages and the recovery of earned wages and, consequently, the importance of facilitating the fastest and cheapest possible resolution of such claims – i.e., as Plaintiffs assert, allowing full prosecution of this suit in state court.

Additionally, Plaintiffs rely upon dictum from a decision of this Court construing the jurisdictional grant contained in the Consumer Credit Protection Act ("CCPA"), 15 U.S.C. §§ 1601-1693r. Provisions of the various subchapters of that act allow actions thereunder to "be brought in any appropriate United States district court . . . , or in any other court of competent jurisdiction." 15 U.S.C. 1640(e); 1681p. The plaintiff in *Griffin* had initiated his action under the CCPA in state court, and the defendant therein had removed it to this Court. In concluding that the CCPA action was due to be remanded, this Court examined the language of the jurisdictional grant of the CCPA and concluded that it evidenced an intent to preclude the removal of CCPA actions already commenced in state court. In reaching this conclusion, this Court relied (as explicitly stated) in part on an analogy to the jurisdictional grant of the FLSA contained in § 216(b), an analogy which had been the sole basis for the same conclusion regarding the removability of FLSA actions made by the court in *Ruth v. Westinghouse Credit Co.*, 373 F. Supp. 468 (W.D. Okl. 1974), the only authority regarding removability cited in Court's *Griffin* opinion. Plaintiffs thus assert that "this Court has adopted, both implicitly and explicitly, the holding of [the Eighth Circuit] in *Johnson*. . . . " (Dkt. 6 at 7).

Finally in rebuttal, Defendant offers dictum from the Ninth Circuit's opinion in *Emrich v. Touche Ross & Co.*, 846 F.2d 1190 (9th Cir. 1988), in which, in the context of deciding whether a federal RICO claim could be removed to federal district court, the Ninth Circuit examined and commented upon a number of federal statutes over which there was concurrent jurisdiction between state and federal courts, noting that some, like the FLSA, contained

no prohibition on removal, while other federal statutes did.[3]

In addition to the foregoing, as noted by the parties, a number of lower federal courts have decided the issue presently before this Court. Some have allowed removal; others, including two districts within this circuit, have prohibited it.[4]

Having examined all of the foregoing authorities, as well a number of the lower court opinions on this issue, the Court concludes that the better view is that FLSA actions can be removed to federal district court. In 28 U.S.C. § 1441(a), Congress has plainly stated that absent an express statutory provision to the contrary, the right of removal to federal district court exists as to all actions over which the district courts have original jurisdiction. As the FLSA is a federal statute, providing various rights and remedies for violations of those rights, an action thereunder is undisputably one over which this Court has original jurisdiction. *See* 28 U.S.C. § 1331. Plaintiffs can not cite to the Court any express provision regarding the FLSA, whether as part of Title 28 or the FLSA itself, which prohibits removal of those actions to this Court.

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[3] Although noted cited by either party, the Court would also point out that noteworthy commentators have expressed the opinion that removal of FLSA actions should be allowed. Charles A. Wright et al., *Federal Practice and Procedure* § 3729, pp. 495-98 (1985) (noting the split of authority and concluding that the better view is that FLSA actions should be allowed to be removed since there exists no express provision by Congress prohibiting removal, as required by § 1441(a)).

[4] *Babula v. Alachua County Bd. of Commissioners*, No. GCA 91-10044-MMP (N.D. Fla. March 27, 1991); *Brantley v. Augusta Ice & Coal Co.*, 52 F. Supp. 158 (S.D.Ga. 1943).

Thus, as to the FLSA, the plain requirements of § 1441(a) have not been met – a conclusion which abides whether or not one strictly construes the removal statute, as Plaintiffs assert the Court is obliged to do in instances of ambiguity or doubt.

Further, the Court would note that as to other federal statutes Congress has clearly demonstrated that it knows how to "expressly provide otherwise by Act of Congress" and thereby satisfy § 1441(a), whether as part of the general provisions of Title 28, *see* 28 U.S.C. § 1445(a)-(b), (d) (prohibiting the removal of actions brought in state court pursuant to various federal statutes, including the Federal Employers' Liability Act), or as part of particular federal statutes themselves, *see* 15 U.S.C. § 77v(a) (prohibiting the removal of actions brought in state court pursuant to the Securities Act of 1933). This Court therefore cannot conclude, as did the *Johnson* court, that prohibiting the removal of FLSA actions would "do no violence to the removal statute," 162 F.2d at 89. Such a prohibition on removal would, in fact, do significant violence to the removal statute, for it would effectively elevate the fact of the existence of one arguably ambiguous word in the FLSA and an opinion in an unrelated Senate Report to the status of an express provision by Act of Congress.

Upon consideration thereof, it is hereby **ORDERED** that Plaintiffs' Motion to Remand (Dkt. 5) is **DENIED.**

DONE AND ORDERED, at Jacksonville, Florida, this 7th day of November, 1997.

/s/ Ralph W. Nimmons, Jr.
RALPH W. NIMMONS, JR.
UNITED STATES
DISTRICT JUDGE

Copies to: Counsel of Record
Denise Seymour, Courtroom Deputy Clerk
Margaret Costa, Judicial Assistant